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THE QUIET REVOLUTION IN THE AMERICAN LAW PROFESSION: REMARKS BEFORE THE COMMISSION ON PROFESSIONALISM OF THE AMERICAN BAR ASSOCIATION*

Peter Megargee Brown**

I. Introduction

The Commission on Professionalism¹ will examine "perceptions" of lawyers, the public and the media, define the concept of professionalism and determine the true state of American lawyers today.²

* Thursday, October 10, 1985, American Bar Center, Chicago, Illinois.

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1. The Commission on Professionalism was created to study: (1) whether or not we are experiencing a decline in professionalism, broadly defined; (2) what effect any such decline is having on the profession and the public; as well as (3) what should be done about the situation by law schools, disciplinary commissions, the bench, and the practicing bar.

2. In 1789, the year of George Washington's inauguration, the City of New York had only 29,000 inhabitants, living in 4,000 houses occupying the tip of Manhattan Island. T. SMITH, *THE CITY OF NEW YORK IN THE YEAR OF WASHINGTON'S INAUGURATION* 7 (1889). In July, 1789, the roll of New York attorneys admitted to practice in the Supreme Court contained 122 names, of which 28 were admitted that year. *Id.* at 61. On the rolls were Robert Morris, John Jay, Aaron Burr, Alexander Hamilton and John Lawrence. *Id.* "By an act of February 20, 1787 no person was to be admitted to the bar of any court unless he had been brought up in that court or was otherwise well-practiced and had been found by his dealings to be skillful and honest." *Id.*

The lawyer has been the subject of attack and ridicule from the earliest American days. When John Lawrence ran for Congress, he provided the text for the following remarks:

Of the men who framed that monarchical, aristocratical, oligarchical, tyrannical, diabolical system of slavery, the *New Constitution*, one half were Lawyers—!

Of the men who represented, or rather misrepresented, this city and country in the late convention of this state, to whose wicked arts we may chiefly attribute the adoption of that abominable system, seven out of the nine were lawyers.

This same class of men will do all they can to establish and confirm that nefarious system, and as long as they are blindly trusted by the

This approach is appealing because the word "perception" recognizes that this study, with a distinguished panel and thorough as it may be, is not conducive of scientific proof.³ And like the spirit of liberty, as Learned Hand suggested, the conclusion may be laced with some doubts.⁴

people, we shall never be able to succeed in our virtuous attempts to destroy it.

And what crowns the wickedness of these Lawyers is that the great majority of them throughout the state are violently opposed to our great and good head and never failing friend of the city and city interests, the present governor. That aspiring party are the worst enemies of his and our virtuous aspirings.

We warned you against them at the election for convention-men; we now warn you against them again.

Beware, beware, beware of Lawyers!

[Signed] A true Antifederalist and *NO LAWYER!*

N.Y. Daily Advertiser, Mar. 4, 1789, at 2, col. 3 (emphasis in original).

3. Fidelity, attitude, perspective may be, by their ephemeral nature, hard to pin down. Themes for these intangibles can be found in statements by two noted American lawyers written a century apart: Abraham Lincoln in 1850, and Henry Stimson in 1947. Abraham Lincoln stated:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81-82 (Basler ed. 1953).

Henry Stimson wrote:

Through many channels I came to learn and understand the noble history of the profession of the law. I came to realize that without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality. I learned of the experience of those many countries possessing constitutions and bills of rights similar to our own, whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American Lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed.

H. STIMSON & M. BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR xxi-xxii (1947).

4. See LEARNED HAND, THE SPIRIT OF LIBERTY 189-91 (I. Dillard ed. 1960)

The question may be whether the American lawyer finds his or her highest honor in a deserved reputation for fidelity to private trust and public duty. Or is the American lawyer today ignoring obligations as "officers of the court" in serving private clients and the public interest.⁵ In blunter words: is the practice of law now simply a business whose success is measured solely by profits?

My perception, after thirty-six years at the bar, is that cumulative evidence indicates a serious decline in the American lawyer's professionalism in the last ten years. The decline, I believe, is the result of short-sighted attitudes and perspectives⁶ of a large number of

(concept introduced in 1944 by Judge Hand in speech to new citizens in New York's Central Park).

5. Cf. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer & M. Lerner ed. 1966) (American aristocracy is not found among the rich but is found at the bar and the bench).

6. Attitudes and perspectives are difficult to assess but nonetheless have profound effects on behavior patterns, goals, and values derived from our hereditary endowment. Rene Dubos, an eminent microbiologist and Pulitzer Prize winner states that "[t]he attitudes and activities which set man apart from other animals can be comprehended only by observing the responses of real persons to surroundings and events." RENE DUBOS, *THE GOD WITHIN* 21 (1972). "Many problems of civilized life have their origin in the fact that we function in the technological world with a biology and psychology dating from the Stone Age." *Id.* at 47. "Objectivity is misleading when it does not take subjective feelings into account." *Id.* at 61. "Social justice may be a universal concept, but in practice the awareness and exercise of it are conditioned by highly personal experiences." *Id.* at 67. "Each individual decision . . . influences the social group as a whole. In this sense man makes himself, individually and socially, through a continuous series of willful acts that are governed by his value judgments and his anticipation of the future." *Id.* at 79. "Acuity of perception and representational skill have not shown any detectable improvement since the Stone Age. They are qualities which are biological in essence and which have always been unevenly distributed among people regardless of their level of civilization." *Id.* at 81. "Similarly, the kind of person a human being becomes is determined in large part by the kind of activities he elects to emphasize." *Id.* at 82. "Even under the most favorable conditions, the present ways of life do not necessarily result in better health and happiness—let alone provide the proper setting for civility. Something has gone wrong with technological civilization during the past 100 years." *Id.* at 207.

As used by Ellul [referring to Jacques Ellul's book, *THE TECHNOLOGICAL SOCIETY* (1954)] the word *technique* does not refer to particular technologies. It implies rather a highly rational attitude in dealing with all human problems, social as well as technical. From the point of view of *technique*, efficiency is the ultimate criterion of success. For the sake of efficiency social institutions and customs must be continuously changed, and traditions must be rejected even though they are the expression of ancestral wisdom. *Technique* demands that life be regimented, mechanized, and automated to fit the efficiency of machines; it implies also a centralized, bureaucratic, soul-less way of dealing with people, because this contributes to the efficiency of social life. Ellul regards it as a *fait accompli* that modern societies have been taken over by anonymous

American lawyers that practice law as a business rather than as a profession.⁷

II. Definition of Professionalism

Can we define the law profession? While summing up Benjamin N. Cardozo's belief concerning a lawyer's role, Whitney North Seymour, Sr., stated that a lawyer is not a "journeyman" devoted to his own interests, but has a duty to his profession arising out of its special nature: "the lawyer's exclusive franchise to practice law and his vital role in the administration of justice."⁸ A lawyer,

technological forces which operate independently of human control and have truly become the most influential kinds of social institutions.

Id. at 209 (emphasis in original). "The demons to be exorcised are . . . not in technology but in the minds of men." *Id.* at 214. "Civilizations commonly die from the excessive development of certain characteristics which had at first contributed to their success. Our form of industrial civilization suffers from having allowed experts to make growth and efficiency, rather than the quality of life, the main criterion of success. Among the hopeful signs of our times are the ground swell of dissatisfaction against this state of affairs and the awareness that, if things are in the saddle, it is because we have put them there. To repeat, the demonic force in our life is not technology per se, but our propensity to consider means as ends." *Id.* at 233.

7. Warren Burger, Chief Justice of the United States Supreme Court, issued an early alarm in 1977: "We may well be on our way to a society overrun by hordes of lawyers hungry as locusts competing with each other, and brigades of judges in numbers never before contemplated." See N.Y. Times, May 28, 1977, at A1, col. 1 (statements of Warren Burger at a conference sponsored by the American Bar Association at Columbia University Law School). In the same year, the Chief Judge of the New York Court of Appeals, Charles D. Breitel, cautioned lawyers about "greed" and "self-interest." See N.Y. Times, May 3, 1977, at A1, col. 1 (speech of Charles D. Breitel, Law Day Dinner, 1977). The Chief Judge's observation was viewed by the majority of lawyers as after-dinner idealism and ignored.

8. See WHITNEY NORTH SEYMOUR, *THE OBLIGATIONS OF THE LAWYER TO HIS PROFESSION* 12 (1968) (Twenty-Fifth Annual Benjamin Cardozo Lecture delivered by Whitney N. Seymour before the Association of the Bar of the City of New York, March 19, 1968) [hereinafter cited as *THE OBLIGATIONS OF THE LAWYER*], reprinted in 23 REC. A.B. CITY N.Y. 311, 312-13 (1968).

Judge Cardozo was devoted to his profession and had a high opinion of the lawyer's role He believed . . . that the lawyer is not just a journeyman devoted to his own interests but that he has a duty to his profession The origin of this broad duty is in the special nature of the profession. It is a necessary corollary of the lawyer's exclusive franchise to practice law and his vital role in the administration of justice. The public has given the franchise to a select group, deemed by learning and character worthy to enjoy it exclusively, and there arises a duty to use these qualities to serve both private and public interests in exchange.

THE OBLIGATIONS OF THE LAWYER, *supra*, at 11-12, reprinted in 23 REC. A.B. CITY N.Y. at 312-13.

recognizing this broad duty, is professional while remaining independent, that is, free to perform his or her professional obligations objectively—to clients, the court and the public interest. Above all, professionalism rises above self-interest. A self-important presiding partner of a large law firm said one day, when his colleagues objected to his myopic “business” orientation: “But what they don’t understand is that my law firm has rent to pay on four floors at Wall Street.” Another senior partner-manager of a big multi-state law firm was asked why his firm had declined to share in a public interest pro-bono program at the city’s local Bar Association. He was quoted as replying that “lawyers at his firm were already ‘drowning in work’ and lacked the extra time for public service.”⁹

These views are not rare examples of such attitudes and perspectives but rather are, I submit, pervasive coast to coast.¹⁰

III. Causes of the Decline

I am not persuaded that the decline of the American bar as a true profession is due principally to the huge number of lawyers,¹¹

9. Margolick, *Vance's Plea to City Firms Got One "No"*, N.Y. Times, May 20, 1984, § 1, at 37, col. 1.

10. See Schwartz, *The Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269 (1980) (discussing various changes that have resulted in bureaucratization of legal profession, such as increasing number of lawyers, formation of national bar, weakening of bar's self-regulation and increasing size of law firms).

In 1939, a young professor at Yale Law School wrote a provocative book that achieved quick notoriety. See F. RODELL, *WOE UNTO YOU LAWYERS* (1939). It was the author's thesis that the law as espoused by lawyers is a sort of hocus-pocus quasi-science:

In tribal times, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning . . . blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy . . . guard[s] the tricks of its trade from the uninitiated, and run[s], after its own pattern, the civilization of its day.

Id. at 3. Now the masters, it seems, are taking full advantage of their exalted position by turning the profession into a trade.

11. Today about 90 law firms have over 200 lawyers. Nat'l L.J., Sept. 22, 1986, at S-4. One firm at last count had over 800 lawyers on its staff, along with hundreds of supporting staff, including accountants, paralegals, business-trained administrators, librarians, specialists, technicians, and the new golden boys, the public relations experts. *Id.* Judge J. Edward Lumbard commented on this phenomenon: “Since I left law school we have seen the growth of these enormous law firms The more people you have with you in a venture, the more you have to consult other people and make compromises of your own point of view, and sometimes of your own standards.” A CONVERSATION WITH J. EDWARD LUMBARD 89-90 (1980) (series of interviews with Judge Lumbard conducted for Columbia University Oral History Project in cooperation with New York Bar Foundation,

although it may be a factor in the exacerbation of the vulgarity of the rat race. Nor can the blame be placed exclusively on law school training, patchy as it may be in some cases. The trouble is that philosophers doubt that you can teach character.¹²

and edited by committee of former Assistant United States Attorneys who served under Judge Lumbard in Southern District of New York between 1953 and 1955) [hereinafter cited as J. EDWARD LUMBARD]. See also S. Brill, *Headnotes*, AM. LAW., May 1983, at 1, 12 (increasing numbers of law firms are "issuing press releases and otherwise peddling themselves"); Lewin, *A Gentlemanly Profession Enters a Tough New Era*, N.Y. Times, Jan. 16, 1983, § 3, at 1, col. 2. This article reveals that big firms are now "hustling for clients": "For these firms, a new era has dawned, one in which the practice of law has ceased to be a gentlemanly profession and instead has become an extremely competitive business." *Id.* The article ends with a quote from a 39-year-old partner in what was once an old-line Wall Street firm: "I'm ecstatic that we're now thinking about where our practice is going and how much money we should be making next year." *Id.* at 10, col. 5.

12. Cf. Stein, *The Struggle Not to Sell Out*, ESQUIRE, Sept. 1985, at 35. Stein writes about balancing external validation and personal ideals:

[I]f there is not precisely a stigma attached to adhering to personal standards, neither, in a growing number of fields, is it rewarded; that, in fact, in the professional arena it is those seemingly without commitment to anything other than themselves who most frequently wind up getting ahead. . . . [N]ever has the definition of legitimate behavior in the world at large been so broad, or individual rigor been in such short supply. . . . When he went into practice more than thirty years ago, wrote a former lawyer named Vic Gold recently, attorneys routinely regarded the law as a mission—and the years since have seen "the ethical descent of the legal profession to the level of a Baghdad flea market." . . . The issue here is not effort but quality of effort—a distinction that sometimes seems beyond contemporary understanding.

Id. at 35-36.

Few lawyers have shown the way to the legal profession as persuasively as Whitney North Seymour, Sr., a trial lawyer for half a century. He died on May 21, 1983. Seymour was President of the American Bar Association, the Association of the Bar of the City of New York and the American College of Trial Lawyers. In 1968 he was invited to give the Benjamin N. Cardozo lecture at the Association of the Bar of the City of New York, where he said to a crowded meeting hall:

I have always been impressed by Lord Moulton's dictum: "the measure of a civilization is the degree of its obedience to the unenforceable." The essential values of our national life: recognition that man is not a mere animal but possesses a spirit and a divine spark which makes each life precious, and those subsidiary qualities—friendliness, neighborliness, loyalty, fidelity, love of family, fairness, sympathy for the underdog—are all primarily dependent on the unenforceable. There can never be, and never should be, enough police to bring about obedience even if they were enforceable. The decline in the roles of church, school and family in teaching these values and qualities should not be allowed to leave a vacuum. The bar provides much of the leadership in our communities; it is the duty of the bar to see to the enforceable but it must not neglect steady nourishment also of devotion to the unenforceable.

THE OBLIGATIONS OF THE LAWYER, *supra* note 8, at 33-34, reprinted in 23 REC. A.B. CITY N.Y., at 334-35.

Is there real evidence of a decline in the American law profession?¹³ The shift in lawyers' attitudes and outlooks is subtle. I suspect that some members of the bar are content with the breakdown of the standards, as it allows them license to do as they please for their own benefit. This is why I think the law profession revolution is a quiet one. At the same time, when examined closely, the changes wrought have been virtually 180 degrees from the early canons of lawyer behavior and outlook.

Many bar leaders have been discreet, if not silent, about the havoc. Few complain. At a lawyers seminar at a posh Florida hotel, the agenda was devoted to business techniques designed to build a firm's law practice. The moderator was a former Attorney General of the United States. Noticing the "standing room only" attendance at the seminar, the Attorney General acknowledged with a shrug that the law profession was now a business¹⁴ and there was not much that could be done about it. The current Attorney General of the United States, speaking in New York City to a crowded room of businessmen and women, began his address with a joke about how lawyers defraud clients on submission of bills with padded time.

13. To measure decline, there must be some knowledge of the standards and examples of earlier days of the profession. See *A VISIT WITH WHITNEY NORTH SEYMOUR* (E. Fox ed. 1984), which contains Seymour's own feelings concerning his life, philosophy and beliefs:

At Columbia [University School of Law], under teachers like Stone and Gifford, who gave criminal law, and Terry, who gave contracts, you could not think of anything but integrity in a lawyer. You knew right away what that meant. You did not lie to courts; you did not try to outsmart your adversary in any improper way. And so right from the beginning there never was an alternative to integrity. The idea that you would try to do things in a slippery way would just never occur to you.

Id. at 15.

From my observation of law students and young lawyers for almost half a century, I believe most of them are drawn to our profession out of motives beyond its being a mere means to a livelihood, though keeping the wolf from the door is not an unworthy objective. The great men of the law, teachers, judges and lawyers, have had pervasive influence on the attitude of the profession, which was never more sensitive to its responsibilities than it is today. The fact that many judges and lawyers, here and in England, were deeply involved also in public service and had a noble view of the duties of the profession has helped to mold it. And those who, like Judge Cardozo, spoke repeatedly of the profession's duties and ideals and used the phrase "punctilio of an honor" about another fiduciary duty, contributed to the atmosphere in which the profession exists at its best.

Id. at 33-34 [hereinafter cited as *WHITNEY NORTH SEYMOUR*].

14. Cf. Harrell, *President's Page*, 69 A.B.A. J. 864 (1983) ("[w]e must not permit the practice of law to become just another business"); *id.* at 554 (noting that A.B.A. Section of Economics of Law Practice has developed "an on-going regional seminar" entitled "Survival Tactics for Lawyers in the 80's").

The unique soul of the legal profession inherited from England, Rome and Greece has now shifted its focus from public service to self-serving marketing and productivity.¹⁵ Today the lawyer delivers the product; professional intangibles are irrelevant and unwelcome.

For two centuries American lawyers provided leadership in government, business and public opinion—as well as providing objective advice to private clients.¹⁶ The founders of our republic were lawyers. Lawyers served to preserve our liberty. Our fundamental documents—the Declaration of Independence, the Constitution and the Bill of Rights—are primarily the work of lawyers. What has happened?¹⁷

A. Lack of Vision

The causes are many and complex, but essentially reflect attitudes and lack of vision of a significant group of American lawyers who view their practice only as a source of revenue. It is also, unknown to the general public, the economic pressures that have grown wildly

15. The shift in the responsibility of the bar has been noted before. A Harris poll several years ago rating public confidence in sixteen institutions placed law firms near the bottom of the list. See N.Y. Times, Jan. 8, 1978, at A15, col. 1. The Watergate scandal, which involved extensive media coverage of lawyer perfidy, had a great deal to do with this.

16. See THE OBLIGATIONS OF THE LAWYER, *supra* note 8, at 14, reprinted in 23 REC. A.B. CITY N.Y. at 315. Whitney North Seymour, Sr., commented on the lawyer's obligations:

The breadth of the lawyer's obligations does not rest alone on logic. No lawyer who tries to serve the public interest through the organized bar or otherwise, first says to himself: "I must do this to justify my exclusive franchise." Rather his sense of professional and public responsibility is an almost instinctive by-product of his whole background and training for the profession. With good luck, he is nourished on it from the moment he chooses the profession; the great law teachers, who themselves chose the profession because it was much more than a way to make a living, weave the sense of duty into their teaching, and many lawyers and judges emphasize it in their lives.

Id.

17. Within the last decade, criticism of the American legal profession has grown. See *Those **** Lawyers*, TIME, Apr. 10, 1978, at 56; *America's Lawyers: "A Sick Profession"?*, U.S. NEWS & WORLD REP., Mar. 25, 1974, at 23. The theme of the articles pertains to rising doubts about the competence and integrity of lawyers and the fact that public confidence in lawyers is at an all-time low. For a more detailed examination of the concerns regarding the legal profession, see J. AUERBACH, UNEQUAL JUSTICE (1976); L. DOWNIE, JR., JUSTICE DENIED: THE CASE FOR REFORM OF THE COURTS (1971); M. FRANKEL, PARTISAN JUSTICE (1980); J. LIEBERMAN, THE LITIGIOUS SOCIETY (1981).

Because of the high fiduciary responsibility inherent in the practice of law, deviations from standards have been noted since the birth of our country. See generally SAINT JOHN DE CREVECOEUR, LETTERS FROM AN AMERICAN FARMER (1787) (lawyers grow like weeds, promote litigiousness and amass more wealth than the most successful farmer with backbreaking labor).

on lawyers and law firms, large and small.¹⁸ Lawyer salaries are, in major law firms, much too high, if not absurd. The starting rate for associates at one firm in New York City reached \$54,000 annually in September 1985.¹⁹ The average beginning salary in New York City among the large firms is \$49,700.²⁰ Law associates become in turn articles of commerce driven to constant night and weekend work, generating, in treadmill style, the commodity of billable hours. Floor after floor of fancy offices to impress the "client" are questionable, if the "client" is to be gouged.²¹

There is also the unseemly competition "for business" bringing rising aggressiveness and incivility. Lawyers have been told by the United States Supreme Court that they have a right to advertise.²² To have a right does not mean that it must be exercised, or exercised for that matter in bad taste, or with innuendo of misleading promise. Do you want a divorce cheap? Have you considered welching on your debts by inexpensive bankruptcy? Self-restraint has always been the essential discipline of any profession. And public service, not self-service, has been its linchpin. But what we often see is blatant lawyer advertising, brazen soliciting of clients and other lawyers' clients around the clock, and brands of hucksterism that would make a medicine man blush. In the rush for bucks there is something lost that is quite sad: the loss of soul in the profession.²³

18. For a discussion of the economic pressures on law firms, see Bernstein, *Profit Pressures on the Big Law Firms*, FORTUNE, Apr. 19, 1982, at 84; Lewin, *A Gentlemanly Profession Enters a Tough New Era*, N.Y. Times, Jan. 16, 1983, at D1, col. 2; Lewin, *Putting Litigation on a Budget*, N.Y. Times, Apr. 2, 1982, at D1, col. 2.

19. See Nat'l L.J., Sept. 30, 1985, at 1, col. 1. After this speech was given, a major New York City law firm raised its annual salary for first-year associates to \$65,000. See N.Y.L.J., Apr. 16, 1986, at 1, col. 3.

20. See Nat'l L.J., Sept. 30, 1985, at 1, col. 1.

21. A senior partner at one Wall Street firm proudly took his wealthiest client around the plush floors of the newly decorated law firm. On leaving, the lawyer asked his client what he thought of the handsome new quarters. As the elevator door closed, the client said, "Well now, I wonder who is going to pay for all this."

22. See *Bates v. State Bar*, 433 U.S. 350 (1977).

23. In 1946, Eugene O'Neill gave a press interview during rehearsal of the first production of "The Iceman Cometh," which was quoted in the New York Times on September 29, 1985. See Gelb, *O'Neill's "Iceman" Sprang from the Ashes of His Youth*, N.Y. Times, Sept. 29, 1985, § 2 (Arts & Leisure), at 1, col. 2. O'Neill touched on the kernel of this personal philosophy about the attitude of Americans: he thought America had been "given everything, more than any other country," but had failed to acquire "any real roots":

[America's] main idea is that everlasting game of trying to possess your own soul by the possession of something outside it, thereby losing your own soul and the thing outside of it, too This was really said in

B. Bigness

Another factor that deserves consideration is the pyramiding trend toward multi-state and multi-national law firm partnerships. In a profession, *big* is not necessarily *better*. Because bigger might produce more profits (on the basis of charging what the traffic will bear), size should not be decisive. The particular nature of the law profession, long recognized as special, enmeshed as it is in the administration of justice, is of intimate quality²⁴ which cannot, without changing substance, be mass produced on assembly lines while accountants watch for inefficiencies on the computer screen.

C. Lack of Broad Education and Experience

A further factor distorting attitudes and outlooks of lawyers, and thereby undermining our profession, is the diminution of broad

the Bible much better. We are the greatest example of "For what shall it profit a man, if he shall gain the whole world and lose his own soul?" We had so much and could have gone either way. If the human race is so damned stupid that in two thousand years it hasn't had brains enough to appreciate that the secret of happiness is contained in that one simple sentence, which you'd think any grammar school kid could understand and apply, then it's time we dumped it down the nearest drain and let the ants take over.

Id. at 4, col. 6. See Brill, *Shaking Out*, AM. LAW., July-Aug. 1983, at 9. In this piece the editor-in-chief of the American Lawyer acknowledged that intangible values like "soul" should not be cut out of the law profession equation: "I guess I, too, am a sucker for the proposition that law firms should not be office-sharing arrangements for individual entrepreneurs—that for lawyers, intangible values like 'soul' should still play some role in management." *Id.* at 13.

24. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1981) ("[a] basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence"); *id.* Canon 7 (lawyer should represent client zealously within the bounds of the law).

The lawyer's monopolistic license to practice our profession stems from our traditional commitment to public service. As we become more profit-oriented we are bound to come under increased governmental regulation. Non-lawyers will increasingly fill the void in the legal system and take away a larger and larger portion of the lawyer's traditional rewards and prerequisites. Already, much evidence shows that the federal and state legislatures, along with the courts, will continue to expand their regulation and control over lawyer conduct and their legal fees. See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983). The Preamble to the Model Rules states: "To the extent that lawyers meet the obligations of their professional calling, the occasion for governmental regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." *Id.* The fact that this even needs to be said is good cause for alarm.

education and varied experience.²⁵ In college the student takes pre-law. In law school they may read nothing but law, mostly appellate cases, and rat-race for marks. At the law firm, the associate has a prescribed measure of performance of billable hours which, by any analysis, precludes outside community activity or even reading outside the law. The President of Yale University, A. Bartlett Giamatti, recently observed that a person without a broad education and with no sense of history will simply end up a little "solipsistic twit."²⁶ Large law firms, for reasons of economics and efficiency, have narrowed lawyers' training within and without the law and

25. See J. EDWARD LUMBARD, *supra* note 11, at 86. Judge Lumbard commented on a young person preparing for a career in the law profession:

I think anything you study which helps you to think clearly and express yourself clearly, not only in speaking but in writing, is the best training for the study and practice of law, which is after all the art of communicating ideas to other people clearly and persuasively. Almost anything you study in the humanities will help to develop that ability to some degree, but I think particularly the study of the English language, English composition, English literature—any reading whether it is written in English or in translation to English—is helpful.

Id. at 86. Judge Lumbard also commented on the need for judgment:

I suppose the most important quality for a lawyer is good judgment. I have known a great many people to be at the top or near the top of their class at law school and if they do not have good judgment—which is a sense of when it is the right time to do certain things under certain circumstances and when it is not—it does not make any difference how bright they might be in finding an answer to theoretical questions. You are dealing with human problems and people and their feelings and their reactions, and it is good judgment that tells you by some process that we do not always understand what is the wise and expedient and feasible thing to do for Mr. A at a particular time in view of the problems that he faces. So the prime quality is good judgment.

Id. at 89.

26. See N.Y. Times, Mar. 6, 1983, § 6 (Magazine), at 54. President Giamatti—not a lawyer—spoke to the Second Circuit Judicial Conference in 1982:

In our success in encouraging the necessary specialties we have forgotten two things: the lesser being, that specialists can only communicate with other specialists; the greater being, that if no one communicates the principles and purposes upon which the specialists depend to the larger society, the larger society will continue to be dependent but, without any understanding of broad principles or purposes, will only grow resentful and suspicious. It will increasingly come to distrust the specialist. What is far worse, the lay public will deepen in ignorance and indifference regarding the essential goals of the law about which no one has designed to speak publicly and clearly. The cynicism about lawyers, the suspicions about courts, the lust to supplant law with decree that one hears on all sides worries me a great deal and it should worry you.

A. Bartlett Giamatti, Remarks at Second Circuit Judicial Conference (Sept. 1982), reprinted in 38 REC. A.B. CITY N.Y. 34, 38 (1983).

have enforced premature specialization. The effects of this process can be telling on the lawyer's service and judgment.

Many lawyers today boast that they are engaged in business for commercial profit with "markets to carve out," concentrating on the "bottom line."²⁷ In most cases there is no shame about the consequences of this quiet revolution. The agendas of lawyer and judicial conferences reveal that there is little if any recognition that the upheaval has even occurred. Too many lawyers seem content with the new materialism. "I'll get my kids through an Ivy League college" They are happy to give lip service to the lawyer's professional obligations. They sometimes go so far as to penalize associates and even other partners who perform public interest work and give help to less affluent clients.

These factors combine to turn the American legal profession upside down into a business machine to make dollars. We are beginning to feel the consequences.²⁸

IV. The Root of the Problem

We live in a young country where change is the law of life and survival. Most changes are for the good in a dynamic socio-economic society. Women and minorities have joined the legal profession in this generation in ever-widening numbers, a development both enriching and strengthening to the bar. These changes evolve and are encouraging. But the deep-cut changes taking place in the last decade in the American law profession are of fundamental principles. The result is staggering to our profession. The American bar finds itself in trouble, suffering from uncomfortable symptoms. Criticism of American lawyers for their transgressions is neither irresponsible nor casual. The malaise goes deep.

27. See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 562 (1st ed. 1973). According to Friedman, "[w]e have become simply a multitude . . . engaged in the same business. And the objects and the methods of those engaged in that business are very much dictated by those who employ them. [Lawyers] . . . do simply what their employers desire." *Id.*

28. See Scott, *Lawyers Who Sue Lawyers*, N.Y. Times, June 26, 1977, § 6 (Magazine), at 78. For a better understanding of what is going on among the so-called elite lawyers and their law firms, see J. STEWART, *THE PARTNERS* (1983) (investigative reporting consisting almost entirely of personal interviews as well as review of documents); see also L. AUCHINCLOSS, *HONORABLE MEN* (1985); L. AUCHINCLOSS, *NARCISSA AND OTHER FABLES* (1983); L. AUCHINCLOSS, *LIFE, LAW AND LETTERS: ESSAYS AND SKETCHES* (1979); L. AUCHINCLOSS, *THE PARTNERS* (1974); L. AUCHINCLOSS, *A WRITER'S CAPITAL* (1974) (novels and short stories putting lawyers and law firms under scrutiny on questions of professional ethics and greed); cf. P.M. BROWN, *THE VOYAGE OF A LAW PARTNERSHIP* (1982) (sketch of how law partnership operates, contributes, rewards, and disinherits).

If lawyers' responsibilities are being neglected today, the worst remedy would be to instigate a public relations campaign to repair the image of the lawyer. Bar leaders of high repute have already suggested this course. Concerning this tactic, the late Whitney North Seymour, Sr., said, "we must not fall into the Madison Avenue habit of worrying about the image of the lawyer, nor thinking that we can do anything about it through any kind of synthetic public relations activity. The fact is . . . that when the bar lives up to its great traditions it has little, if any, public relations problems. One cannot paper over deficiencies in the bar by any devices."²⁹ This wisdom is just as true today.

The downward trend of the law profession has the insidious effect of bringing a crisis not only to the American bar but also to American life, because the lawyer in the United States is so integral to all activity. Lawyers are community leaders and run our government, however, too many lawyers in the United States have lost their way.

The root of the problem is that many lawyers have forgotten that the purpose of the legal profession is to serve the public interest. Many American lawyers have lost, or have never had, a historical perspective and are unaware of the origins and goals of the legal profession.³⁰ A profession properly defined rises above self-interest.

Chief Justice Warren Burger has found much of our legal profession in disarray, if not unfaithful to its mission: "Our [legal] system is too costly, too painful, too destructive, too inefficient for a truly civilized people."³¹ Such a condemnation twenty years ago from a chief minister of justice would have rocked the bar. But his assessment has drawn indifference, sometimes ridicule and anger from a body of lawyers snug in their fur-lined ruts.³²

29. Address by Whitney North Seymour, Sr., American Bar Association Award of Merit, 1971.

30. The legal profession, unlike the marketplace of business enterprises, encompasses an extraordinary degree of trust and confidence. Out of this particular attorney-client relationship evolves a quite different set of values, standards, and prescriptions. These arduous considerations—based on the experience of centuries—have been hammered into codes, canons, customs, and traditions that seek to assure that the legal profession truly serves its critical functions.

31. Remarks of Chief Justice Warren Burger, American Bar Association Midyear Meeting (Feb. 12, 1984); see Margolick, *Burger Says Lawyers Make Legal Help Too Costly*, N.Y. Times, Feb. 13, 1984, at A13, col. 1 (noting that the Chief Justice's address at the midyear meeting "contained some of the harshest comments he has ever made on the ethics of the bar").

32. See, e.g., Brill, *Uncle Warren*, AM. LAW., Oct. 1984, at 1 ("many ABA types . . . have tacitly decided that Warren Burger is the bar's lame uncle. And for good reason. His twice-yearly addresses to the ABA have become a spectacle of redundant stupidity"). But see Brown, *Letters to the Editor*, AM. LAW., Nov. 1984, at 4 (response to Brill's "unwarranted trashing of the chief justice").

The atmosphere has become that of a Baghdad flea market:³³ the blatant touting and puffing of wares; legal gossip publications stoking the flames of the business mentality within the profession while selling law office computer equipment and marketing client-building seminars. The current barbarians may well be the newly anointed "Manager-Accountants" who run the machine. They talk earnestly about the "real world"—their world. Their creed is the printout, the computer and the bottom line. Their caterwaul is, "nothing is forever, not clients, not partners, not anything" All this despite centuries of history.

Many people ask why the law profession's trend to business is bad for the profession. The reason may be that the lawyer's monopolistic license to practice law stems from commitment to public service. This includes protecting individuals from oppression of the state and state-like institutions and also helping out in the community. The following examples illustrate this much-needed commitment to public service. The Argentine newspaper publisher, Jacobo Timerman, was jailed incommunicado and tortured in 1977 for speaking out against the repressive junta.³⁴ "At dawn," Timerman wrote, "one morning . . . some [twenty] civilians besieged my apartment in midtown Buenos Aires. They said they were obeying orders from the 10th Infantry Brigade of the First Army Corps. They covered my head with a blanket. They threw me to the floor in the back of the car."³⁵ A lawyer, Genaro Carrio, came to Timerman's wife, at great personal and professional risk, and said that he would be willing to go to the courts to free her husband.³⁶ Timerman's wife replied that she had no money to pay him.³⁷ The Argentine lawyer nevertheless agreed to do the work without fee.³⁸ He did, and Jacobo Timerman was eventually released.³⁹

On September 21, 1985, The New York Times' David Margolick reported the horrible ordeal of a Korean greengrocer, Kyoong Ahn, wrongfully charged in Brooklyn Criminal Court with assault and harassment stemming from a fierce squabble with a customer in his store.⁴⁰ In fact, the customer had abused and assaulted the green-

33. See *supra* note 12.

34. Timerman, *Return to Argentina*, N.Y. Times, Mar. 11, 1984, § 6 (Magazine), at 36.

35. *Id.* at 36.

36. *Id.* at 95.

37. *Id.* at 96.

38. *Id.*

39. *Id.*

40. Margolick, *With a Little Help, 2 From Korea Find Legal System Works*, N.Y. Times, Sept. 21, 1985, at B29, col. 1.

grocer.⁴¹ Kyoon Ahn, who could not speak enough English to explain, was taken away in handcuffs by the police and booked without an opportunity even to lock his store.⁴² When he returned, hours later, the store had been looted.⁴³ A neighborhood foot patrolman heard about the injustice and found a lawyer, Richard Guay, who agreed to represent the greengrocer without his usual fee.⁴⁴ Although Kyoon Ahn was offered an opportunity to plead guilty to a lesser criminal charge, defense lawyer Guay rejected the plea: "I went into the case so [my client] could walk away with dignity, not be processed by the system and plead guilty to some reduced charge for the sake of expediency."⁴⁵ So he filed a petition asking the court to dismiss the case.⁴⁶ The District Attorney's office strongly opposed.⁴⁷ Client Kyoon Ahn next learned—with immense relief—that his lawyer had succeeded and the case was dismissed.⁴⁸ The judge wrote: "It is important, and in the interests of justice, that [his name], along with [his family's], be cleared."⁴⁹ A lawyer's sense of public service upheld our traditional system of law and justice.

Efficient management and sound economics are obviously useful but should not be exalted to the exclusion of traditional professional values. To stress money as the primary goal of American law practice turns the profession on its head.⁵⁰

41. *Id.* at B50, col. 3.

42. *Id.* at B29 col. 2.

43. *Id.*

44. *Id.* at B50, col. 4.

45. *Id.* at B50, col. 5.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. America has an early history of Draconian fee legislation. Before 1642, in the Virginia colony, lawyers were in high demand and were charging their clients exorbitant fees. The Act of March 1642-43 provided for licensing attorneys and fixing their fees in pounds of tobacco for specified services. See 1 VIRGINIA STATUTES AT LARGE 275 (W. Hening ed., 1823). In November, 1645, the Virginia General Assembly prohibited lawyers from charging any fee at all. *Id.* at 302. The bill passed read as follows:

Whereas many troublesom [sic] suits are multiplied by the unskillfulness and coveteousness of attorneys, who have more intended their own profit and their inordinate lucre than the good and benefit of their clients. *Be it therefore enacted*, That all mercenary attorneys be wholly expelled from such office, except such suits as they have already undertaken, and are now depending, and in any case any person or persons shall offend contrary to this act to be fined at the discretion of the court.

Id. (emphasis in original).

V. What Can Be Done?

The trend towards business at the expense of professionalism can be stemmed by the leaders of the bar. Necessity does not require us to disregard centuries of professionalism.

A. Leadership and Inspiration

Mostly the law profession needs leadership and inspiration. Lawyers should enforce their own codes and rules. Young people coming to the bar should be taught by example that lawyers serve the public interest as well as the private client. Younger lawyers should be given an historical perspective on the role of lawyers in a noble profession going back many generations.

If the American bar does not do its duty to the public good, to the administration of justice, and to aspirations of the profession, then its trust will be taken away and, through public regulation, decisions will be made that the profession should be making for itself.

B. Restraint

We need a return to professional restraint. Lawyers' fervid solicitations of clients and demands for outrageous fees result from the sacrifice of long established professional ethics, and obligations of the bar. "The life of the law has been not by logic," said O. W. Holmes, Jr., "it has been experience."⁵¹ These traditional principles have served for centuries to curb, as Chief Justice Warren Burger has recently reminded us, the "practices and customs common and acceptable in the rough and tumble of the marketplace. Historically, honorable lawyers complied with traditions of the Bar and refrained from doing all that the laws or the Constitution allowed them to do. Specifically, they did not advertise, they did not solicit . . . they considered [the] profession as one dedicated to public service."⁵²

VI. Consequences of the Current Trend

Ninety percent of lawyers who do not go into court with any regularity are, seated at their office desks, virtually undisciplined by any meaningful code of responsibility. In recent years, the stated

51. O. W. HOLMES, *THE COMMON LAW* 1 (De Wolfe Howe ed. 1963).

52. Chief Justice Warren Burger, Remarks at American Bar Association Midyear Meeting (Feb. 12, 1984).

purpose of the law profession has been redefined and undermined to mean the self-interest of the lawyer and the client. The lawyer's former role as an "officer of the court," with a definite obligation to the public interest and to the court, reaching beyond the self-interest of the client and the lawyer, has been cut down by lawyers.

My own feeling is that if the courts and organized bar leadership will not or cannot stop the new materialism at the bar, then eventually governmental regulation on both the state and federal levels will put an end to these abuses in various ways. The legal profession, as we know it, will emerge a restructured body. Its professionalism and independence could be severely compromised by such government regulation and restructuring.

Should these trends continue on their current, regressive course, the American legal profession could be compelled to separate into two groups. Those lawyers directly involved in the administration of our judicial systems (demonstrating ability and willingness to abide by strict professional standards as officers of the court) could be licensed by the state as "Advocates." The balance of the legal profession who forego practice in our judicial systems (or are unwilling to meet requisite standards of conduct) could remain as "Attorneys-at-Law."

Advocates and Attorneys-at-Law could each have their own integrated state Bar Associations setting appropriate standards for each group. The American Bar Association could exercise overall surveillance to encourage and monitor the maintenance of high standards for the American bar as a whole.

This proposal is less a radical departure in the profession than a recognition that this is the reality of today. Although there would be two groups providing legal services, I am not in any sense suggesting that what would result in this country would be comparable to the indigenous British system of barristers and solicitors.

VII. Conclusion

A crucial issue is whether citizens of the United States will continue to allow lawyers not directly involved in the administration of our judicial systems, or Attorneys-at-Law as I have described them, to have a monopoly in providing legal services. In the absence of any real public service by these lawyers, the citizens of this country may ultimately compel them to give up their monopolistic license and instead be certified only as legal specialists. Let the word go out.

On the other hand, if the profession today continues its precipitous decline, it may become necessary for the preservation of freedom

under law to bring together those members of the law profession willing to sacrifice self-interest and, as officers of the court, keep alive those liberties essential to civilization.